*THE HONOURABLE SRI JUSTICE V.V.S.RAO

+WRIT PETITION No.3495 of 1999

%16-3-2006

M/s.SOL Pharmaceuticals Ltd.

...PETITIONER

Vs.

$ Mandal Revenue Officer, Nampally Mandal, Nampally, Hyderabad and another

...RESPONDENTS

! COUNSEL FOR PETITIONER: Sri C.Kodanda Ram,
^COUNSEL FOR RESPONDENTS: Government Pleader for Revenue

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>HEAD NOTE:

? CASES REFERRED:

1. AIR 1990 SC 1017
2. AIR 1997 SC 2027
3. AIR 1998 SC 2928
4. AIR 2000 SC 1583
5. AIR 2000 SC 2553
6. (1993) 2 SCC 144 = 1993 AIR SCW 991
7. (2002) 108 Com Cas 406
8. AIR 1998 SC 2064

THE HON'BLE SRI JUSTICE V.V.S.RAO

WRIT PETITION No.3495 OF 1999

16.3.2006

Between:

M/s.SOL Pharmaceuticals Ltd.

… Petitioner

AND

Mandal Revenue Officer, Nampally Mandal, Nampally, Hyderabad and another

… Respondents

THE HON'BLE SRI JUSTICE V.V.S.RAO

WRIT PETITION No.3495 OF 1999

ORDER:

The petitioner is a company registered under the Companies Act, 1956. It is engaged in the business of manufacturing various pharmaceutical products distributed, stored and marketed throughout India. It has sales offices in the State of Uttar Pradesh and assessed to sales tax by the Assistant Commissioner (Tax Assessment), Gaziabad. According to the petitioner, for the months of April, 1997 and May, 1997, it is due an amount of Rs.12,435/- and Rs.53,282/- towards sales tax to the Government of Uttar Pradesh. A demand notice, dated 30.03.1998, was issued and while the petitioner was taking steps to pay the same, it received notice from the first respondent under A.P.Revenue Recovery Act, 1884 (the R.R.Act, for brevity) demanding payment of a sum of Rs.1,59,05,995/- towards trade tax arrears for the assessment year 1995-1996. The petitioner denies any liability to pay sales tax dues and accordingly, requested the second respondent to drop all the proceedings, in vain. In the meanwhile, the petitioner was declared as sick industrial company in case No.236 of 1998, under Sick Industrial Companies (Special Provisions) Act, 1985 (SICA, for brevity). Therefore, the petitioner has filed the present writ petition in 1999 seeking a writ of Mandamus declaring the action of the respondents in proceeding under R.R.Act as illegal and arbitrary. The petitioner states that the demand made by the first respondent is illegal and violative of Articles 14 and 19(1)(g) of Constitution of India, that the petitioner is taking necessary steps to question the demand made by the second respondent and that though only show cause notice is issued under the R.R.Act, the first respondent is regularly visiting the factory to attach and sell its properties. It is also alleged that two thousand employees in the petitioner industry would suffer if the properties are attached and sold.

The second respondent filed a counter affidavit, wherein it is stated that the petitioner is an assessee under U.P.Trade Tax Act, 1948 (Trade Tax Act, for brevity) as well as Central Sales Tax Act, 1956, having business transactions in the State of Uttar Pradesh. The petitioner failed to remit final assessment amount for the assessment years 1990-1991 to 1997-1998 in a sum of Rs.1,59,05,995/- towards trade tax to Government of Uttar Pradesh and towards central sales tax. If the petitioner is aggrieved by this, it has to file a statutory appeal provided under Sections 9 and 10 of Trade Tax Act, but it has not availed this remedy. It is alleged that the petitioner is also due another sum of Rs.41,86,605/-. When the petitioner failed to deposit the amounts in spite of several demands from the Office of the second respondent, action was initiated under U.P.Revenue Recovery Act, 1890, and the Collector and District Magistrate, Gaziabad, sent recovery certificate, dated

11.12.1998, under the U.P.Revenue Recovery Act to the District Collector, Hyderabad, informing that the petitioner committed default in payment of the trade tax amounts and requesting to recover the same as arrears of tax revenue. Accordingly, by letter, dated 08.12.1999, the Mandal Revenue Officer, Nampally, the first respondent herein, was instructed to realize the amounts under R.R.Act, pursuant to which, the impugned demand notice was issued to the petitioner. After receiving the same, the petitioner sent a reply on 23.01.1999 to the first respondent informing that the matter is pending before the Board for Industrial and Financial Reconstruction (BIFR). As the petitioner did not show any sufficient cause, the first respondent issued notice of attachment on 19.02.1999, where after the petitioner approached this Court. The total amount due from the petitioner for the assessment years 1990-1991 to 1997-1998 is Rs.2,00,92,600/- towards U.P.Trade Tax as well as central sales tax, but a demand is made only for Rs.1,59,05,595/- which, the petitioner is bound to pay to discharge its statutory liability. It is not open to the petitioner to take the plea that the matter is pending before the BIFR under SICA. The payment of trade tax to the State Government and Central Government is first priority for the assessee and it is not open to the petitioner to neglect the payment.

Learned counsel for the petitioner, Sri C.Kodanda Ram, placed strong reliance on Section 22(1) of SICA and contends that when once the company is declared as sick industrial company, all proceedings for recovery of all amounts remain suspended and therefore, the impugned notice issued by the respondents is illegal and in contravention of the provisions of SICA. He placed reliance on **Gram Panchayat v Shree Vallabh Glass Works Ltd, Deputy Commercial Tax Officer v Corromandal Pharmaceuticals, Tata Davy Limited v State of Orissa, M/s.Rishabh Agro Industries Limited v P.N.B. Capital Services Ltd** and **M/s.Patheja Brothers Forgings and Stamping v I.C.I.C.I. Ltd**.

The learned Assistant Government Pleader for Revenue (General), Sri Surya Kiran, while placing strong reliance on **Corromandal Pharmaceuticals** (supra) would urge that even when a company is declared as sick company, the recovery of sales tax dues is not barred under law. He would point out that Section 22 of the SICA results in automatic stay of only certain proceedings and the proceedings for recovery of sales tax have not been specifically mentioned in Section 22 of SICA and that there is no bar to proceed under the Revenue Recovery Act.

SICA is an enactment intended for timely detection of sick and potentially sick companies, and for speedy determination and implementation of remedial measures to prevent or cure industrial sickness. It is not an enactment intended to give a tax holiday or to impose moratorium on recovery of debts, to sick and potentially sick companies, whose net worth is less than the accumulated losses. As observed by Justice B.P.Jeevan Reddy in **Corromandal Pharmaceuticals** (supra), it is a product of era of protectionism seeking to keep alive sick companies by pumping in public funds and providing various concessions. Among many, one *modus operandi* of conferring concessions is to go light against the sick companies in the matter of recovering the debt incurred by it or preventing it from dying a slow death due to crunch of funds, unavailability of raw-material, technology and the like. Aiming at this aspect, the Parliament enacted Section 22 of SICA.

Section 22 of SICA appears in Chapter III (Sections 15 to 22A) under the heading 'References, Inquiries and Schemes'. Under Section 15 of SICA, the Board of Directors of the company, whose net worth is equal or below the accumulated losses, can make a reference to BIFR (constituted under Section 4 of SICA) for determination of the measures to be adopted in respect of such company, which has become sick by reason of inadequate net worth. The Board may then examine the reference either by itself or with the assistance of any agency. After receiving report of such agency, a decision will have to be taken by BIFR as to whether it is practicable for the sick company to make its net worth exceed the accumulated losses within a reasonable time. In case, it is not possible to revise the sick company and to make the net worth positive, the BIFR may direct the operating agency to prepare a scheme regarding the measures to be taken. Initially, a draft scheme will be prepared and after considering the objections or suggestions to the draft scheme from the shareholders, creditors and/or employees, BIFR can approve the scheme either to transfer the sick company to other company, or to amalgamate the sick company and approve the scheme. This is the basic procedure as contemplated under Sections 15 to 18 of SICA, though there could be minor variations here and there depending on the circumstances of each case. Section 19 of SICA deals with winding up of the sick industrial company on recommendation of the BIFR. Sections 22 and 22A (as inserted by Sick Industrial Companies (Special Provisions) Amendments Act, 1993), deal with interim measures to protect the sick company so as to stop further erosion of its net worth during the pendency of the proceedings before BIFR or during the implementation of the scheme framed by it under Section 18 of SICA. Section 22A of SICA empowers the BIFR to direct the sick company not to dispose of the assets of the company during the period of preparation and consideration of the scheme under Section 18 and during the winding up proceedings before the High Court.

Section 22 of the SICA for the last decade has generated controversy with regard to stay of various civil, criminal and company proceedings against a company, which approached BIFR. Section 22(1) is relevant and before considering its other sub-sections as well, it may be extracted.

> **22.Suspension of legal proceedings, contracts, etc.-** (1) Where in respect of an industrial company, an inquiry under Section 16 is pending or any scheme referred to under section 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal under section 25 relating to an industrial company is pending, then, notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect under the said Act or other law, **no proceedings for the winding up of the industrial company or for execution, distress or the like** against any of the properties of the industrial company or **for the appointment of a receiver** in respect thereof and **no suit for the recovery of money or for the enforcement of any security** against the industrial company or of **any guarantee in respect of any loans or advance granted** to the industrial company shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority.

(emphasis supplied)

Under sub-section (1) of Section 22 of SICA, certain proceedings against an industrial company would not lie or be proceeded with except with the consent of the BIFR or Appellate Authority for Industrial and Financial Reconstruction (AAIFR). These proceedings remain suspended when an enquiry under Section 17 is pending or a scheme under Section 18 is under preparation, consideration or implementation, or where an appeal under Section 25 of SICA is pending before AAIFR? What are the proceedings, which would not lie or can be proceeded with? These are i) a proceeding for winding up of the sick company;
ii) a proceeding for execution, distress or the like against any of the properties of the sick industrial company; (iii) a proceeding for the appointment of a Receiver in respect of the property of the company; and iv) a suit for recovery of money or for enforcement of any security against sick company or of any guarantee in respect of any loan or advance granted to it.

Under Section 22(2) of SICA, where the management of the sick company is taken over or changed pursuant to a scheme under Section 18 of SICA, the right of the shareholders of the sick company to nominate or appoint a Director to pass a resolution remain suspended. They simply cannot do these two things. Sub- section (3) of Section 22 of SICA deals with powers of BIFR to suspend contracts, agreements, settlements and awards by or against a sick company pending action under Sections 16 to 18 of SICA. Sub-section (4) of Section 22 of SICA is to the effect that the order/declaration by BIFR under sub-section (3) will have overriding effect notwithstanding agreement or any decree or order of the court, tribunal, officer or other authority. It further lays down that the remedy for enforcement of any right, privilege or obligation, remains suspended only till the declaration by BIFR under sub-section (3) is in force and under sub-section (5) of SICA, the period of limitation does not run during the force of the declaration by BIFR. The proviso to sub-section (3) of Section 22 of SICA is very important. It lays down that the declaration by BIFR (prohibiting and suspending all actions against sick companies) shall not be made for a period exceeding two years, which can be extended from time to time not exceeding a total period of seven years in aggregate.

The analysis of all the sub-sections in Section 22 of SICA would show that the Parliament consciously did not prohibit the recovery of arrears due to the sovereign nor the provision prohibits recovery of the money from a sick company, which in effect does not belong to it. In case of a loan borrowed by a sick company, the provision specifically bars any suit for recovery of such loan, whereas such specific bar is absent in respect of recovery of revenue due to the State. One should not forget that the Parliament is presumed to be aware of the entire existing law before SICA was made. By that time, it was known that all the sales tax laws provided for recovering sales tax arrears as land revenue dues under appropriate Revenue Recovery Act by issuing demand notice attaching the property and selling the property. But still the Parliament did not specifically bar the recovery of sales tax

arrears notwithstanding the fate of an industrial company seeking reference under Sections 15 to 18 of SICA. This cannot be ignored. Though a proceeding, by distress, against the properties of industrial company, is also one kind of adverse proceeding against the company, the same has to be interpreted ej*usdm generic* (of the same sort). Therefore, on true interpretation of Section 22(1) of SICA in its entirety must lead to conclusion that distress in connection with execution of a decree or an order of winding up, alone remain suspended during the pendency of a proceeding or a scheme by BIFR. The distress or attachment for recovery of arrears of sales tax dues are not covered under Section 22(1) of SICA. This draws support from various decided cases as discussed below.

I n **Shree Vallabh Glass Works** (supra), a gram panchayat initiated coercive proceedings for recovery of property tax dues from sick company, which was on an application by the company injuncted from recovering without consent of BIFR. The gram panchayat was also unsuccessful before the Supreme Court. The Supreme Court interpreted Section 22(1) of the SICA directly and held that though creditors are not allowed to recover their dues from the sick company for temporary period, the proceeding for recovery is postponed and is revived under Section 22(5) of SICA. The relevant observations are contained in paras 10 and 11 and read as under.

> 10. In the light of the steps taken by the Board under Ss.16 and 17 of the Act, no proceedings for execution, distress or the like proceedings against any of the properties of the company shall lie or be proceeded further except with the consent of the Board. Indeed, there would be automatic suspension of such proceedings against the company's properties. As soon as the inquiry under
> S.16 is ordered by the Board, the various proceedings set out under sub-section (1) of S.22 would be deemed to have been suspended.
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> 11. It may be against the principles of equity if the creditors are not allowed to recover their dues from the company, but such creditors may approach the Board for permission to proceed against the company for the recovery of their dues/ out standings/ overdues or arrears by whatever name it is called. The Board at its discretion may accord its approval for proceeding against the company. If the approval is not granted, the remedy is not extinguished. It is only postponed. Sub-section (5) of S.22 provides for exclusion of the period during which the remedy is suspended while computing the period of limitation for recovering the dues.

The ratio in **Shree Vallabh Glass Works** (supra) that Section 22(1) bars the creditors of the sick company from proceeding with the suit execution or attachment of the properties. What all Section 22(1) of SICA temporarily prohibits is the enforcement of mutual rights and obligations between a debtor and creditor. Sales tax is an indirect tax, which has to be paid by the purchasers/buyers to the Sovereign. Legislature, however, has adopted a practice where seller itself is permitted to collect the sales tax from the buyer and remit the same periodically to the Sovereign and non-payment thereof is visited with penal consequences. It is not possible to consider the relationship between the Sovereign and a seller as that of creditor and borrower. A seller keeps the sales tax payable to the Sovereign on

behalf of the State and therefore, it is the money of the State, which is with seller that is recovered in accordance with the sales tax laws. If the property in the hands of sick company does not belong to it, Section 22 (1) of SICA has no application.

In **Corromondal Pharmaceuticals** (supra), the sales tax assessee challenged the recovery proceedings for the sales tax dues before the High Court on the ground that without permission from BIFR, such recovery proceedings cannot be allowed. The High Court allowed the writ petition. Before the Supreme Court, the Sales Tax Department urged that the arrears of sales tax relate to the period after sanctioned scheme was brought under implementation and therefore they stand excluded from the purview of Section 22 of SICA. On an analysis of the provisions of SICA, the apex Court came to the conclusion that Section 22(1) of SICA is not an absolute bar for recovery of any dues from the sick company. After referring to **Shree Vallabh Glass Works** (supra), **Maharashtra Tubes Limited v State Industrial and Investment Corporation of Maharashtra Limited** and the decisions of Calcutta, Gujarat, Himachal Pradesh and Madhya Pradesh High Courts, the Supreme Court held that Section 22(1) of SICA does not bar recovery of sales tax dues and that the statutory bar applies only to such of the dues payable by the sick company which are reckoned or included in the sanctioned scheme for rehabilitation. The relevant observations are as follows.

> On a fair reading of the provisions contained in Chapter III of Act 1/1986 and in particular Sections 15 to 22, we are of the opinion that the plea put forward by the Revenue is reasonable and fair in all the circumstances of the case. … The language of Section 22 of the Act is certainly wide. But, in the totality of the circumstances, the safeguard is only against the impediment, that is likely to be caused in the implementation of the scheme. If that be so, only the liability or amounts covered by the scheme will be taken in, by Section 22 of the Act. So, we are of the view that though the language of Section 22 of the Act is of wide import regarding suspension of legal proceedings from the moment an inquiry is started, till after the implementation of the scheme or the disposal of an appeal under Section 25 of the Act, it will be reasonable to hold that the bar or embargo envisaged in Section 22 (1) of the Act can apply only to such of those dues reckoned or included in the sanctioned scheme. Such amounts like sales tax, etc, which the sick industrial company is enabled to collect after the date of the sanctioned scheme legitimately belonging to the Revenue, cannot be and could not have been intended to be covered within Section 22 of the Act. Any other construction will be unreasonable and unfair and will lead to a state of affairs enabling the sick industrial unit to collect amounts due to the Revenue and withhold it indefinitely and unreasonably. Such a construction which is unfair, unreasonable and against spirit of the statute in a business sense, should be avoided.

In **Tata Davy** (supra), recovery proceedings were initiated against the appellant under Orissa Sales Tax Act, 1947. On challenge, the High Court of Orissa decided against the appellant holding that Section 22(1) of SICA is not a bar to initiate recovery proceedings against the assessee. Before the Supreme Court, reliance was placed on **Shree Vallabh Glass Works** (supra). Following the same, the appeal was allowed observing that Tata Davy Limited and other appellants were not

enabled to collect tax due to the Revenue from the customers after the sanctioned scheme but the sick unit simply folded its hands and declined to pay it over to the Revenue. The observations made by the Supreme Court are as follows (para 13 of AIR).

> The Corromandal Pharmaceuticals judgment (supra) dealt with a sick industrial company which was enabled to collect amounts like sales tax after the date of the sanctioned scheme. This Court said, "such amounts like sales tax, etc. which the sick industrial company is enabled to collect after the date of the sanctioned scheme, legitimately belonging to the Revenue, cannot be and could not have been intended to be covered within Section 22 of the Act". It added that the issue that had been arisen before it had not arisen in the case of Vallabh Glass Works (surpa). It did not appear therefrom or from any other decision of this Court or of the High Courts "that in any one of them, the liability of the sick company dealt with therein itself arose for the first time after the date of sanctioned scheme. At any rate, in none of these cases a situation arose whereby the sick industrial unit was enabled to collect tax due to the Revenue from the customers after the sanctioned scheme but the sick unit simply folded its hands and declined to pay it over to the Revenue, for which proceedings for recovery had to be taken". Clearly, the facts in the Corromandal Pharmaceuticals case differ from the facts of the Vallabh Glass Works case and those before us. The reference to the Corromandal Pharmaceuticals case is, therefore, in apposite.

In **Sarvaraya Textiles v Commissioner, E.P.F.,**, a Division Bench of this Court, to which I was a Member, considered the question as to whether the proceedings by the Provident Fund Organization against an industrial company for recovery of Provident Fund (PF) arrears could be stayed. It was contended that in view of *non-abstente* clause in Section 22(1) of SICA, the recovery of any dues irrespective of its nature has to be stayed. This Court rejected the submission and held as under.

> In the light of the provisions of the EPF Act and the Scheme framed thereunder, we are of the view that the rights of the employees under the Provident Fund Scheme are protected and the proceedings under the EPF Act do not come within the purview of the provisions of section 22(1) of the SICA. An amendment to the EPF Act was made by Act 33 of 1988 in terms whereof Section 14B has been introduced. Under section 14B, where as employer makes default in the payment of any contribution to the fund, the Central Provident Fund Commissioner has been authorized to recover damages by way of penalty not exceeding the amount of arrears. However, under the proviso appended thereto, the Central Board has been empowered to reduce the quantum of damages that may be required to be paid by a company in relation to an establishment which is a sick industrial company and in respect of which a scheme for rehabilitation has been sanctioned by the BIFR subject to such terms and conditions as may be specified in the scheme. When the provisions of section 14B were inserted, Parliament took cognizance of the provisions of the EPF Act and in its wisdom only the recovery of damages was permitted to be reduced or waived subject to the

conditions provided thereunder. Even the conditions specified in para 32-B of the scheme do not provide for any provision exempting a sick company from withholding the provident fund contributions collected from the wages of the employees or prohibiting the authority under the EPF Act from proceeding against such employers who defaulted to remit the contributions collected from the wages of the employees to the provident fund, in accordance with the provisions of the EPF Act.

Though the learned counsel cited the other decisions of the Supreme Court in **Real Value Appliances Limited v Canara Bank**, **Rishabh Agro Industries Limited** (supra) and **Patheja Brothers Forgings** (supra), it is not necessary to refer to these decisions.

The conspectus that results from a reference to various precedents is somewhat broadly as follows. If an industrial company after seeking reference under Section 15 of SICA or during consideration by BIFR under Sections 17 and 18 of SICA or implementation of the scheme formulated under Section 18(5) of SICA is enabled to collect the provident fund, sales tax and other indirect taxes, which do not legitimately belong to it but belong legitimately and constitutionally to the State, the same are not covered within the ambit of Section 22 of SICA. If an industrial company seeking a reference had already become sick, defunct and non-productive much before seeking reference and the sales tax arrears, if any, formed part of the scheme framed by BIFR, Section 22 of SICA is a bar but not otherwise. Further more, as observed by the Supreme Court in **Tata Davy** (supra), the collection of tax due to Revenue from customers after sanctioned scheme is important facet of the applicability or non-applicability of protective measures in Section 22(1) of SICA.

In the present case, admittedly, the petitioner company did not become defunct or non-productive or stopped its substratum activity before seeking reference under Section 15(1) of SICA in 1998. In all probability, it continued to collect sales tax from various customers through out India where they were doing business and fell in arrears of sales tax to the State Government of Uttar Pradesh for the assessment years 1990-1991 to 1997-1998. There is no evidence before this Court nor any averment is made that the petitioner company was not enabled to collect sales tax from the customers, which was to be passed on to the Revenue. Therefore, the ratio in **Corromandal Pharmaceuticals** (supra) applies to the facts of this case. Indeed, in the affidavit accompanying the writ petition, the petitioner admits that it is due an amount of Rs.12,435/- and Rs.53,282/- for the months of April, 1997 and May, 1997 respectively and it is willing to pay such amount. This would also support the finding of this Court as above. Therefore, there is no infirmity in the first respondent issuing the notice, dated 22.01.1999, demanding payment of Rs.1,59,05,995/- towards trade tax.

The writ petition, for the above reasons, is devoid of any merit and is accordingly dismissed with costs.

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(V.V.S.RAO,J)

16.03.2006.

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